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Articles

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by
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Introduction

The United States Supreme Court has acknowledged that "federal magistrates account for a staggering volume of judicial work" and are "indispensable."[1] Numerous statistics show an expansion of magistrate activities.[2] Given heavy federal court caseloads, the possibility of magistrates trying felony criminal cases with the consent of the parties has even been floated within judicial administrative bodies.[3]

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1. Peretz v. United States, 501 U.S. 923, 928-29 n.5 (1991) (citing Gov't of the Virgin Islands v. Williams, 892 F.2d 305, 308 n.5 (3d Cir. 1989)).

2. Two commentators point out that as a result of the 1990 amendments to the civil consent provisions in 28 U.S.C. section 636(c), "the number of trials presided over by magistrate judges increased over 70% from 1019 to 1743 between 1989 and 1994." Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1528 (1995).

3. Comm. on the Admin. of the Magistrate Judges Sys., *Supplement to the Long Range Plan for the Magistrate Judges System* (1994) (on file with author). This idea has not been adopted or implemented so far.

What then distinguishes the core powers of federal district court judges and federal magistrate judges? When Justice Anthony Kennedy served on the Court of Appeals for the Ninth Circuit, he suggested that district judges alone have the power to hold parties in contempt under Article III of the Constitution.[4] Yet, the Federal Courts Improvement Act of 2000 (FCIA) has given magistrate judges limited contempt powers for the first time.[5] Previously, magistrate judges could only certify contempt findings for later district judge rulings.[6] The FCIA raises profound constitutional questions regarding the meaning of Article III, which establishes the federal judicial power.[7] Indeed, the Supreme Court has said that the contempt authority is a "potent weapon" that can be "deadly" if misapplied.[8] This statutory provision also raises the issue of whether magistrates can avoid constitutional problems by how they implement this new power. This Article examines the constitutionality of magistrate contempt powers, and these related implementation questions.

Interestingly, the recent grant of magistrate contempt powers shows history repeating itself. In 1967, Congress proposed abolishing the U.S. Commissioner system and replacing it with a system of magistrates. Congress considered giving these magistrates "the power to try and punish contempts."[9] Eventually the Federal Magistrate's Act of 1968 was passed but without that language. Why was that language deleted? A Committee of the U.S. Judicial Conference expressed "*serious doubts*" about the contempt provision, but said little more.[10] As a result of these doubts, Congress only gave magistrates the power to make recommendations regarding contempt to district court judges.

Thirty years later, the Federal Courts Improvement Act of 1997 also proposed granting limited contempt power to magistrate judges.

4. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 545 (9th Cir. 1984).

5. 28 U.S.C. § 636(e) (2000).

6. 28 U.S.C. § 636(e) (1994) (amended 2000).

7. U.S. CONST. art. III.

8. Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967). Other courts have said that contempt authority is an "awesome power" of the judiciary. *See e.g., In re* Sequoia Auto Brokers Ltd., Inc., 827 F.2d 1281, 1285 (9th Cir. 1987). The Supreme Court has also said that Congress can't exhaustively define contemptuous conduct because contempt power "is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 796 (1987).

9. Proctor v. North Carolina, 830 F.2d 514, 518-19 n.3 (4th Cir. 1987) (quoting from the U.S. Senate Committee Report on the Federal Magistrate's Act of 1968, regarding how district judges should review magistrate contempt certifications).

10. *Id.* (emphasis added).

Despite not opposing the legislation, the Department of Justice (DOJ) informed a House Subcommittee that "giving contempt power to non-Article III judges raises some *constitutional concerns.*"[11] Unfortunately, as with the 1967 Judicial Conference Committee Report, the DOJ did not provide the subcommittee with a thorough legal analysis or reach a definite view about these constitutional concerns. The only difference between the two reports was that "serious doubts" were replaced thirty years later by "constitutional concerns." As the great American philosopher, and former New York Yankees catcher, Yogi Berra once said: "it's deja vu all over again."[12]

There may, however, be something to the judicious avoidance in these approaches because, as Supreme Court Justice Byron White has said, the question of Article III judicial power is "one of the most confusing and controversial areas of constitutional law."[13] Nonetheless, this Article asserts that the Supreme Court would likely find unconstitutional the FCIA summary contempt section which allows magistrates immediately to jail, for a limited period, individuals who are obstructive in court. This summary contempt section violates separation of powers principles and Article III because the magistrate effectively serves as both the prosecutor and the judge at the same time, without the accused's consent, and the accused isn't even allowed a lawyer's representation before being jailed.[14] The limited penalties available to the magistrate judge, and appellate review, do not make up for these flaws. Magistrates in such cases should employ other means, besides contempt, to encourage recalcitrant parties to behave, including the use of sanctions, though issues arise there too regarding a magistrate's authority.[15]

11. H.R. REP. NO. 105-437, at 22 (1998) (emphasis added) (quoting letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to the Honorable Howard Coble, Chairman of the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives).

12. *See* William D. Araiza et al., *The Jursiprudence of Yogi Berra*, 46 EMORY L.J. 697, 714 (Spring 1997).

13. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 93 (1982) (footnote omitted).

14. 28 U.S.C. § 636(e)(2) (2000). This section allows magistrates to use summary criminal contempt power against people who engage in "misbehavior . . . in the magistrate judge's presence so as to obstruct the administration of justice." The difference between criminal and civil contempt powers is discussed later in the text.

15. The Ninth Circuit has approved of magistrates having the authority to impose certain kinds of discovery sanctions related to pretrial proceedings. Grimes v. City & County of San Francisco, 951 F.2d 236, 240 (9th Cir. 1991). But some courts have not allowed magistrates to rule on post-dismissal sanction motions. *See e.g.*, Massey v. City of Ferndale, 7 F.3d 506, 509-10 (6th Cir. 1993).

This Article also asserts, however, that the Supreme Court would uphold the FCIA's other criminal and civil contempt powers (besides summary criminal contempt) because these powers can mainly only be used in cases where the parties have consented to magistrate judge jurisdiction, and because greater procedural protections will normally be afforded the defendant in such instances.[16] Moreover, this Article recommends that district courts alter their magistrate consent forms to acknowledge explicitly that magistrates have these new contempt powers. Such revisions will make it harder for unhappy litigants to challenge the magistrate's use of the powers.

Part I of this Article describes the FCIA's provisions in detail and its legislative history. It also explains the difference between civil and criminal contempt. Part II discusses the leading court decisions regarding Article III and magistrate powers. Part III then demonstrates why the Supreme Court would likely find the summary criminal contempt provision unconstitutional, while upholding the other parts. Part III also questions the Supreme Court's emphasis on consent as the key to magistrate power, and reflects on the problematic implications of the Court's approach for Article III and the federal court system.

I. The FCIA Contempt Provisions And Their Legislative History

A. The FCIA

The Supreme Court has described the difference between civil and criminal contempt orders as "somewhat elusive."[17] This is an understatement. In theory, civil contempt orders are supposed to be remedial, designed to cause the disobedient party to comply with court directives. Thus the party can purge herself of the contempt.[18] For example, an order requiring a defendant to pay a monetary fine every day until the defendant complies with an earlier court directive would likely be viewed as a civil contempt order. By contrast,

16. It should be noted that magistrates can hear petty misdemeanor cases without the defendant's consent, 18 U.S.C. § 3401, and can use this non-summary contempt power in such cases. Given the significant procedural protections present in the non-summary contempt situation, and the trivial penalties involved, this probably would be found constitutional by the Supreme Court. An example of these procedural protections is found in Federal Rule of Criminal Procedure 42(b). The contrast with the summary contempt provision's absence of explicit procedural protections in Federal Rule of Criminal Procedure 42(a) is striking.

17. United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 830 (1994). The Court there elaborated that, "[n]umerous scholars have criticized as unworkable the traditional distinction between civil and criminal contempt." *Id.* at 827 n.3.

18. *Id.* at 827-28.

criminal contempt orders are punitive and designed to vindicate the court's authority.[19]

A typical criminal contempt fine will be paid in a lump sum to the court clerk's office. A civil contempt fine may be paid to the opposing party to remedy unnecessary costs caused by the contumacious conduct.[20] Another difference is that criminal contempt proceedings are considered to be separate from the main case. In effect, the court vindicates the public interest against the defendant. Civil contempt, by contrast, is part of the original case.[21]

Congress has established several contempt options for magistrates in the FCIA. First, a magistrate can exercise "summary criminal contempt authority" over persons who engage in such "misbehavior . . . in the magistrate judge's presence so as to obstruct the administration of justice."[22] This typically covers obstructive actions in court that the magistrate witnesses. Fines or imprisonment are possible penalties. Use of the term "summary" refers to the abbreviated procedures.[23] Usually the judge acts as the prosecutor, and the lawyer must defend herself on the spot with no real advance notice. This provision therefore permits magistrates to hold parties in contempt even where the parties have not actually signed written consent forms to the magistrate's jurisdiction.

Next, the statute provides that magistrates can exercise additional (non-summary) civil and criminal contempt powers in civil cases, and certain misdemeanor criminal cases, where the parties have provided the required consent.[24] These contempt proceedings will usually be held only after the attorney receives notice and a chance to obtain legal assistance. Moreover, the judge will usually appoint a separate prosecutor in non-summary criminal contempt matters. This consent to having a magistrate preside over these cases, however, can only be obtained under procedures which "protect the voluntariness" of the consent and which inform the parties that no "adverse consequences" will result if they insist instead on having a district

19. *Id.* at 828.

20. *Id.* at 829.

21. Belinda K. Orem, *The Impenitent Contemnor: The Power of the Bankruptcy Courts to Imprison,* 25 CAL. BANKR. J. 222, 239 (2000).

22. 28 U.S.C. § 636(e)(2) (2000). The term "summary contempt" is discussed at length in Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 898 n.11, 899-901, 904 n.25 (3d Cir. 1992).

23. *Taberer,* 954 F.2d at 898 n.11, 899-901, 904 n.25.

24. A magistrate's authority to preside over civil cases with the parties' consent is found at 28 U.S.C. section 636(c). Authority for a magistrate to preside over certain misdemeanor criminal cases is established at 18 U.S.C. section 3401. In the criminal misdemeanor context, there is actually a presumption of consent built into that statute unless the party opts out, whereas actual affirmative consent is needed in civil cases.

judge preside.[25] Finally, the FCIA allows magistrates to use the contempt power without consent in certain petty misdemeanor cases.[26]

The FCIA also tries to preserve the distinction between the full contempt power of Article III judges versus this new contempt power for magistrate judges by limiting the penalties that magistrates can impose mainly to misdemeanor-level fines.[27] By contrast, where the magistrate believes a "serious criminal contempt" has taken place requiring a heavier penalty, the magistrate still must certify the matter for the district court's examination, as under the previous version of the statute.[28] Magistrate summary criminal contempt orders are appealable to the district court. The court of appeals alone, however, reviews magistrate contempt rulings in consent cases. The FCIA does not specify appellate review standards.

B. Legislative History and Other Background

The importance and powers of magistrates have grown since the Federal Magistrates Act took effect in 1968, replacing the U.S. Commissioner system.[29] The FCIA contempt statute is just another example of that growth. The Supreme Court has even quoted approvingly from a federal appellate court decision saying that, "[i]t can hardly be denied that the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who conceived it."[30]

The 1979 Magistrate's Act amendments contributed to this increased growth by authorizing magistrates to preside over civil cases and certain misdemeanor criminal cases when the parties consent.[31] Supporters said this was constitutional because consent equals a waiver of any procedural objections, and because magistrates are court adjuncts subject to Article III supervision and appellate review.[32] In 1990, Congress officially designated magistrates as magistrate judges thus enhancing their Article III stature.

25. 28 U.S.C. § 636(c)(2) (2000).

26. 18 U.S.C. § 3401 (2000).

27. 28 U.S.C. § 636(e)(5) (2000).

28. 28 U.S.C. § 636(e)(6) (2000).

29. *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 251-52 (1993) [hereinafter Study]. This was an especially significant study done by the Magistrate Judge Committee of the Judicial Conference.

30. Peretz v. United States, 501 U.S. 923, 928 n.5 (1991) (citing Gov't of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989)).

31. J. Anthony Downs, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 U. CHI. L. REV. 1032, 1032-33 (1985) (referencing the "enlarged power of magistrates").

32. Study, *supra* note 29, at 304.

Despite this growth, the magistrate judge system is like a house of cards because the Supreme Court has not resolved the constitutionality of its basic components. For example, the Court has never ruled on the constitutionality of the consent trial provisions, though all federal appellate courts to address the question have upheld them.[33]

As mentioned earlier, the Senate considered the matter of whether these new magistrates should have contempt powers in 1967. The Senate rewrote some proposed legislation which "would have permitted the U.S. magistrate himself to punish such acts when committed in his presence as contempts of court."[34] Congress instead adopted the certification approach, based on bankruptcy law.[35] The Senate Report justified this change, saying that, "[t]he Committee on the Administration of Criminal Law of the Judicial Conference of the United States expressed *'serious doubts'* about the present provisions ... as presently worded which would give a full-time or part-time magistrate the power to try and punish contempts."[36]

The issue of whether magistrates should have any contempt authority resurfaced in a 1981 Report by the United States Judicial Conference to Congress.[37] As two commentators explain, "Although the Conference made no recommendation on contempt, it suggested that Congress explore the need for such authority for magistrates in appropriate circumstances."[38] In a June 1989 report to the Federal Courts Study Committee, the Magistrate Judges Committee of the Judicial Conference took the view that magistrates should be granted limited contempt powers.[39] The Federal Courts Study Committee did not include the contempt recommendation in its April 1990 report, though it did suggest carrying out a study on the constitutional limits of magistrate authority.[40]

In 1991, the Magistrate Judge's Committee finished this Constitutional Study which was eventually published in the 1993

33. 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3071.1, at 396 (2d ed. 1997) ("Thus there is at least a serious potential problem of squaring section 636(c) with Article III.... The Supreme Court has not directly addressed section 636(c)... [but] [t]he lower courts have, with near unanimity, held that section 636(c) is constitutional.") (footnotes omitted).

34. Proctor v. North Carolina, 830 F.2d 514, 518 n.3 (4th Cir. 1987) (quoting extensively from the U.S. Senate Committee Report on the Federal Magistrate's Act of 1968).

35. *Id.* at 519-20.

36. *Id.* at 518-19 (emphasis added). *See also* Taberer v. Armstrong World Indus., Inc., 954 F.2d 888, 904 (3d Cir. 1992).

37. Pro & Hnatowski, *supra* note 2, at 1513.

38. *Id.*

39. *Id.* at 1517; Study, *supra* note 29, at 306.

40. Pro & Hnatowski, *supra* note 2.

Federal Rules of Decision volumes.[41] The Study concluded that magistrates should not try felony cases because of constitutional problems.[42] On the contempt matter, however, the Magistrate Judges Committee in June 1992 "voted to reaffirm in principle its June 1989 view that a need exists to provide magistrate judges with summary contempt power, but the Committee declined to seek specific legislation."[43]

In June 1994, an amended Long Range Plan for the Magistrate Judges System was developed by the Magistrate Judges Committee which proposed that magistrate judges "be accorded power to punish litigants directly for contempt."[44] In March of 1995, the Committee on Long Range Planning of the United States Judicial Conference issued its Proposed Long Range Plan for the Federal Courts. This Plan recommended "limited contempt authority for magistrate judges . . . ."[45]

Efforts to turn this recommendation into legislation began with H.R. 2294, the Federal Court Improvements Act of 1997. In October of 1997, Judge Philip Pro (then Chair of the Judicial Conference's Committee on Magistrate Judges), Magistrate Judge Tommy Miller (then President of the Federal Magistrate Judges Association), and others testified in favor of this legislation and its provision granting limited contempt powers to magistrate judges. They testified before the House of Representatives Subcommittee on Courts and Intellectual Property, Committee of the Judiciary.[46]

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41. *Id.* at 1523; Study, *supra* note 29, at 247.

42. Study, *supra* note 29, at 306:

> The Magistrate Judges Committee endorses the position that judicial duties in certain critical stages of felony cases, including accepting guilty pleas, conducting sentencing proceedings, and presiding over the trial of a felony case, are fundamental elements of the authority of Article III judges and thus are not appropriate for delegation to magistrate judges, regardless of whether or not the defendant consents to the involvement of the magistrate judge.

But a 1994 Supplement to a Long Range Study of the Role of Magistrates, *supra* note 3, forecasts that growing caseloads mean that magistrates may be needed to preside over felony proceedings with the consent of the parties. The Judicial Conference has not apparently endorsed this Supplement. According to Douglas Lee, drafter of the new contempt provisions, the friendlier attitude towards having magistrates handle felony proceedings in the 1994 Supplement was partly a result of a change in Magistrate Committee composition. Telephone Interview with Douglas Lee, Attorney for the Magistrate Section of the Administrative Office of the U.S. Courts (June 26, 2001).

43. Study, *supra* note 29, at 306.

44. Pro & Hnatowski, *supra* note 2.

45. *Id.* at 1534-35.

46. *The Federal Courts Improvement Act of 1997: Hearing on H.R. 2294 Before the House Subcomm. on Courts and Intellectual Property*, 105th Cong. at 1997 WL 626944 (F.D.C.H.) (testimony of Judge Philip M. Pro, Chair of the Judicial Conference Committee on Magistrate Judges); *The Federal Courts Improvement Act of 1997: Hearing on H.R. 2294 Before the House Subcomm. on Courts and Intellectual Property*, 105th Cong.

Though not opposing the legislation, the Department of Justice sent a letter to the Chairman of the Subcommittee, authored by Assistant Attorney General Andrew Fois, referencing several federal court decisions and suggesting that "giving contempt power to non-Article III judges raises some constitutional concerns."[47] Judge Pro, however, obtained a detailed constitutional analysis, rebutting the DOJ concerns, from Douglas A. Lee, attorney for the Magistrate Judge's Division of the Administrative Office of the U.S. Courts on October 29, 1997.[48] Despite this support, Congress in 1997 failed to enact these contempt provisions.

On March 18, 1998, the full House of Representatives debated the successor Federal Court Improvements Act of 1998 and eventually passed the bill, though it also failed to become law. Congressman Manzullo made a passionate statement opposing the bill's contempt provision based both on substantive constitutional grounds and on a bad experience in his legislative district involving a magistrate that he believed unjustly "took control" of a local school district.[49] Otherwise Congressional opposition was absent.

Congress was subsequently faced with the Federal Court Improvements Act of 1999 which was supported by testimony from Federal Judge Harvey Schlesinger (who had Judge Pro's position) and Magistrate Judge Joel Rosen (who had Magistrate Judge Miller's position).[50] This version was not enacted into law either. Finally the Federal Court Improvements Act of 2000 became law. Magistrate Judge Robert B. Collings, Legislative Chair of the Federal Magistrate Judges Association, compiled documentation that was submitted to Congress to help with the successful lobbying efforts in 2000.[51] Thus, almost 35 years after the idea surfaced, magistrates had the contempt authority.

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at 1997 WL 621873 (F.D.C.H.) (testimony of Judge Tommy Miller, President, Federal Magistrate Judges Association).

47. Memorandum from Administrative Office of the United States Courts Supporting Expanded Contempt Authority for United States Magistrate Judges by Douglas A. Lee of the Magistrate Judges Division (Oct. 29, 1997) (attached to materials sent to author by Magistrate Judge Collings).

48. *Id.*

49. 144 Cong. Rec. H1247 (daily ed. Mar. 18, 1998) (statement of Rep. Manzullo), LEXIS 144 Cong Rec H1247p*1254.

50. *H.R. 1752 Addresses Needs of Federal Court System*, THE THIRD BRANCH (July 1999), *available at* http://www.uscourts.gov/ttb/jul99ttb/hr1752.html.

51. Letter from Robert B. Collings, Chief United States Magistrate Judge, United States District Court of Massachusetts, to Mark Kende, Professor, University of Montana Law School (June 7, 2001) (on file with author).

II. The Relevant Case Law And Constitutional Principles

The Supreme Court has never addressed the constitutionality of magistrate contempt authority though several pre-FCIA federal appellate court cases have touched on the question. Article III, section 1 of the Constitution specifies that:

> The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The keys to the federal judiciary's independence are the good behavior and compensation clauses.[52] The good behavior clause means that federal judges have life tenure absent impeachment. Federal judges are appointed by the President and must be confirmed by a majority of the Senate. The compensation clause ensures that neither Congress nor the President can reduce judicial salaries even if they do not like certain judicial decisions.[53]

Why are independent federal judges an important part of the American constitutional scheme? Several different justifications exist but the most fundamental is separation of powers. This principle lies behind the federal government's three distinct branches of government, each of which acts as a check and balance against the other branches.[54] These checks and balances preclude the development of a tyrannical monolithic government. The judiciary must be independent to check the other branches effectively.

Magistrate judges differ from Article III judges because they lack life tenure, lack constitutional protection from salary reductions,[55] and are not selected at the national level by a presidential appointment with Senate confirmation. They are selected by the Article III judges in their districts and serve eight-year terms. Article III judges can remove magistrates for reasons other than impeachable behavior, such as poor work performance. Thus, magistrates lack the independence of Article III judges. Some commentators and courts have said this raises concerns about impartiality and the possibility of magistrates being influenced by the Article III judges who run their

52. U.S. CONST. art. III, § 1. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 35 (6th ed. 1997).

53. NOWAK & ROTUNDA, *supra* note 52, at 35. *See also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-59 (1982).

54. NOWAK & ROTUNDA, *supra* note 52, at 145.

55. There is, however, a federal statute that protects magistrates from salary diminution. 28 U.S.C. § 634(b) (1994). Of course, that statute could be amended or repealed at any time unlike a constitutional protection.

courts. For example, a chief district judge determined to lower docket numbers could impress that priority on magistrates.[56]

But where does the contempt power fit into this analysis? Article III judges are considered to have "inherent contempt power[s]" because that is one of the keys to the enforcability of their decisions.[57] An inability to enforce the judgments would render the judicial branch toothless in the separation of powers scheme. Magistrates lack such inherent power. The question then is how much of the federal judicial power, designed originally for Article III judges, can be delegated to these non-Article III adjunct courts. Several key cases require examination.

A. Supreme Court Cases

(1) Raddatz

The Supreme Court first visited the issue of the constitutional implications of magistrate powers in a 1980 felony criminal case, *United States v. Raddatz*.[58] The Court ruled that it was constitutional for the Federal Magistrates Act to permit "a district court to refer to a magistrate a motion to suppress evidence and [to] authorize[] the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations."[59] The Supreme Court reversed the Court of Appeals for the Seventh Circuit which had held that defendants in a suppression hearing were deprived of "due process by the failure of the District Court personally to hear the controverted testimony" since "credibility is crucial to the outcome."[60]

The Court reasoned that the defendant's due process rights were not violated, nor was Article III infringed upon, because the district court judge acted as the ultimate decisionmaker and was free to accept, reject or modify the magistrate's findings. The district judge even could have heard testimony. Congress correctly concluded that "permitting the exercise of an adjudicatory function by a magistrate, subject to ultimate review by the district court, would pass constitutional muster."[61]

56. Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc. 725 F.2d 537, 549-54 (9th Cir. 1984) (Schroeder, J., dissenting).

57. *In re* Sequoia Auto Brokers Ltd., Inc., 827 F.2d 1281, 1284 (9th Cir. 1987). Enforceability also turns on executive branch compliance with the Court's more controversial judgments. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

58. 447 U.S. 667 (1980).

59. *Id.* at 669.

60. *Id.* at 672-73.

61. *Id.* at 681 n.8.

Justice Blackmun authored an important concurrence in which he said that any constitutional concern was diminished by the district court's affirmance of the magistrate which meant that the defendant received two bites at the apple and lost both times. The defendant hardly lacked sufficient process.[62] He said that the focus should be on a "practical concern for accurate results."[63] Justice Blackmun also said that in light of these two bites, "I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Article III."[64] Justice Blackmun's approach heralds the origins of a pragmatic approach to Article III. Justice Marshall countered in dissent that the district judge must make first-hand credibility determinations under Article III given the important liberty interests at stake in such a criminal case.[65]

(2) Northern Pipeline Construction Co.

Two years later, the Supreme Court, in a plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[66] found that it was an unconstitutional Article III violation for a United States Bankruptcy Court to handle related state law claims. Justice Brennan's plurality opinion and Justice White's dissent were important because they revealed a basic dichotomy over Article III.[67]

Justice Brennan said that the Bankruptcy Act "impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the Article III district court, and has vested those attributes in a non-Article III adjunct."[68] In other words, Justice Brennan believed that Article III requires certain matters be resolved only by Article III judges because they go to the core of federal

62. *Id.* at 684-85 (Blackmun, J., concurring).

63. *Id.* at 684 (Blackmun, J., concurring).

64. *Id.* at 686 (Blackmun, J., concurring).

65. *Id.* at 694 (Marshall, J., dissenting).

66. 458 U.S. 50 (1982).

67. Justice Brennan also discussed at length whether the new bankruptcy courts could be justified as Article I courts, carrying out constitutional powers bestowed upon the non-judicial branches, as opposed to adjunct Article III courts. He said there were only "three narrow situations... in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* at 64. These situations were territorial courts, military courts, and public rights matters heard by legislative courts and administrative agencies. *Id.* at 64-70. Justice White said that Justice Brennan's "pigeonholing" does "violence" to the meaning of the cases and "creates an artificial structure that itself lacks coherence." *Id.* at 94.

68. *Id.* at 87. *Cf. Ex parte* Bakelite Corp., 279 U.S. 438, 453 (1929) (Article I courts may not consider any matter "which inherently or necessarily requires judicial determination," but only such matters as are "susceptible of legislative or executive determination.").

judicial power.[69] This has been described as the "essential attributes" approach.[70]

Justice White disagreed and advocated a more flexible pragmatic approach. He wrote that "[w]hether an issue can be decided by a non-Art. III court does not depend upon the judicial or non-judicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Art. III court."[71] He noted that the Court had been pragmatic in rejecting any overarching formal principles in addressing the constitutionality of the Article I administrative agency courts that have long adjudicated common law issues.[72] Justice White referred to Justice Harlan, for example, who said that, "Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives."[73]

But what test did Justice White advocate to implement this pragmatic focus? He said that:

> Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.
>
> ....
>
> I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them.[74]

Admittedly, Justice White's focus in this bankruptcy court case had more to do with what powers could be granted to Article I legislative or agency courts, and not adjunct Article III courts which

69. Justice Brennan said that "[m]any of the rights subject to adjudication by the Act's bankruptcy courts ... are not of Congress' creation ... [such as Northern's claim for breach of contract damages].... Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III 'adjunct,' plainly must be deemed at a minimum." *Northern Pipeline*, 450 U.S. at 84 (White, J., dissenting).

70. Daniel E. Hinde, Note, *Consensual Sentencing in the Magistrate Court*, 75 TEX L. REV. 1161, 1168 (1997). Justice Brennan, however, did not obtain a majority to go along with this particular legal principle given that Justices Rehnquist and O'Connor concurred on narrower grounds. *Northern Pipeline*, 458 U.S. at 89.

71. *Northern Pipeline*, 458 U.S. at 108 (White, J., dissenting).

72. *Id.* at 113 (White, J., dissenting).

73. *Id.* at 112 (White, J., dissenting) (quoting Glidden Co. v. Zdanok, 370 U.S. 530 (1962)).

74. *Id.* at 113, 115 (White, J., dissenting).

are the issue with magistrates. But the basic idea of assessing the validity of delegating judicial powers, by balancing the import of the congressional purpose against the burden on fully independent Article III judges, certainly can be applied in the magistrate context. He then elaborated that appellate review of Article I court decisions goes "a long way toward insuring a proper separation of powers."[75] Justice White's pragmatic balancing of interests has been called the due process test.[76]

(3) CFTC v. Schor

Contrary to *Northern Pipeline*, Justice White's pragmatic due process approach won out over Justice Brennan's "essential attributes" view in the Supreme Court's 1986 decision, *Commodity Futures Trading Commission v. Schor.*[77] In *Schor*, the Supreme Court found that Article III was not violated when Congress delegated to the CFTC administrative law judges (ALJs) the power to resolve state law counterclaims in reparations proceedings. Unlike magistrates, ALJs are generally considered part of the executive branch because they are usually selected by the federal agency for which they serve. Nonetheless, the issue of whether ALJs are unconstitutionally carrying out Article III judicial duties is very similar to the question of the permissible authority that can be granted to magistrates as adjuncts to Article III judges.

The CFTC is charged with implementing the Commodities Exchange Act which "broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions."[78] The Court initially pointed out that statutes should, where possible, be construed to avoid constitutional problems.[79] The Court then emphasized that Article III could not be interpreted by "conclusory reference[s]" to its text but instead must be examined with its underlying purposes in mind.[80] The Court elaborated by explaining

75. *Id.* at 115 (White, J., dissenting).

76. Hinde, *supra* note 70, at 1171. This name is appropriate as the Supreme Court has said that evaluating whether a procedural due process violation has occurred, when someone is deprived of life, liberty, or property, involves balancing several factors: the burden on the person injured; the weight of the governmental interest; and the risk of error without a more thorough process. Mathews v. Eldridge, 424 U.S. 319 (1976). Classic procedural due process requirements include notice and an opportunity to be heard. Perry v. Sinderman, 408 U.S. 593 (1972). These are certainly relevant issues in the contempt context where someone's liberty can be in jeopardy.

77. 478 U.S. 833 (1986).

78. *Id.* at 836.

79. *Id.* at 841.

80. *Id.* at 847.

that a pragmatic interpretation was required, not a doctrinaire reliance on formal categories as in the Brennan approach.[81]

The Court then stated that the separation of powers concerns involving Article III have two aspects, a personal and structural one. Separation of powers promotes individual personal concerns because it safeguards a litigant's "right to have claims decided before judges who are free from potential domination by other branches of government."[82] But the Court elaborated that the personal aspect does not "confer on litigants an absolute right to the plenary consideration of every nature of claim by an Article III court" and that, as a personal right, the right is waivable "just as are other personal constitutional rights."[83] Indeed the Court referenced *Northern Pipeline* to illustrate how the absence of consent there was important to the result.[84] The Court subsequently found that Schor had waived any objection to the CFTC tribunal given his activities before that agency.[85] The Court further said that personal interests were the *"primary"* focus of separation powers, rather than structural interests.[86]

According to *Schor*, the structural interests underlying the separation of powers doctrine only bar congressional efforts to transfer jurisdiction to non-Article III courts where the transfers might "emasculate" constitutional courts.[87] Separation of powers is designed to prevent "the encroachment or aggrandizement of one branch at the expense of the other."[88] These kinds of dramatic structural concerns cannot be cured by consent because typically subject matter jurisdiction and other institutional interests are at stake.[89]

81. *Id.* at 848, 857. *Schor*'s pragmatism follows *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), another pragmatic decision in the Article III area.

82. *Schor*, 478 U.S. at 848 (quoting U.S. v. Will, 449 U.S. 200, 218 (1980)).

83. *Id.*

84. *Id.* at 849 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 80 n.31 (1982)) (Justice Brennan says the old bankruptcy referee system required consent of the parties unlike the relatively independent new Bankruptcy Courts). Yet given Justice Brennan's emphasis on the structural violation caused by having non-Article III courts decide these matters, the absence of consent would not seem to be very central to his analysis.

85. *Id.*

86. *Id.* at 848 (emphasis added).

87. *Id.* at 850.

88. *Id.* at 850 (quoting Buckley v. Valeo, 424 U.S. 1, 22 (1976) (per curiam)).

89. *Id.* at 851. There is an interesting issue as to whether granting magistrates contempt power raises subject matter jurisdiction questions or not. But the constitutionality of the FCIA can be addressed without definitively resolving that matter.

The Court in *Schor* then elaborated on some pragmatic factors to be considered in determining whether Congress has infringed impermissibly upon the Article III courts:

> Among the factors upon which we have focused are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[90]

These factors reflect mainly Justice White's pragmatic concerns, though Justice Brennan's essential attributes test acts as a starting point.

In *Schor*, the Court applied these factors and said that the law did not intrude on Article III impermissibly because the CFTC could only hear one kind of common law counterclaim. The Court said such a "single deviation" from the agency model "leaves far more of the essential attributes of judicial power to Article III courts than did the . . . Bankruptcy Act" at issue in *Northern Pipeline*.[91] The Court said that it did not want to reject CFTC jurisdiction "out of fear of where some hypothetical slippery slope may deposit us."[92]

The Court further looked at what role consent should play in the Article III analysis where both personal and structural separation of power concerns are triggered. Does the presence of even some structural concerns mean consent is irrelevant? Or does the personal concern automatically mean consent is crucial since the personal concern is "primary" over the structural one? The Court said the presence of consent "diminishes," without eliminating, the separation of powers concerns.[93] The Court elaborated:

> [C]ongress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences. This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack.... But this case obviously bears no resemblance to such a scenario, given the degree of judicial control saved to the federal courts . . . as well as the congressional purpose

90. *Id.*

91. *Id.* at 852.

92. *Id.* The Court even explicitly said it seeks to apply a "pragmatic understanding" of congressional delegations and Article III.. *Id.* at 853.

93. *Id.* at 855.

behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.[94]

In other words, consent generally justifies non-Article III judge powers unless the legal framework virtually eliminates the business of Article III judges. Interestingly, Justice Kennedy and Seventh Circuit Judge Richard Posner have both expressed constitutional concerns about the diminishing status of Article III judges given the "growing importance of magistrate judges."[95]

Not suprisingly, given his essential attributes approach, Justice Brennan criticized the *Schor* majority for eroding Article III.[96] He quoted the *Federalist Papers* to the effect that an independent judiciary "certainly [can]not be expected from Judges who hold their offices by a temporary commission."[97] Justice Brennan further says the fact that Congress only delegated one common law issue to the non-Article III CFTC judges did not mean there was no dilution of Article III.[98] He then made two other pointed criticisms.

Regarding pragmatic balancing, he said that courts inevitably place too high a premium on the legislative interest asserted for the intrusion, which is usually "immediate, concrete and easily understood *against* [*the Article III concerns*], the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case."[99] In other words, the balancing is "weighted against judicial independence" and "[t]he danger of the Court's balancing approach is, of course, that as individual cases accumulate in which the Court finds that the short-term benefits of efficiency outweigh the long-term benefits of judicial independence, the protections of Article III will be eviscerated."[100] Moreover, he said that the structural and personal concerns underlying separation of powers are "inseparable" and that "consent is irrelevant to Article III analysis" given the presence of important structural concerns.[101]

(4) Peretz

The most recent relevant Supreme Court case involving magistrate powers is *Peretz v. United States*,[102] where the Court

94. *Id.*

95. WRIGHT ET AL., *supra* note 33, at 399 (1997). *See also infra* Section II.B.1.

96. 478 U.S. at 859 (Brennan, J., dissenting).

97. *Id.* at 861 (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)). It is interesting to see the liberal Justice Brennan making an originalist-type argument.

98. *Id.* at 865-66 (Brennan, J., dissenting).

99. *Id.* at 863 (Brennan, J., dissenting) (emphasis added).

100. *Id.* at 863-64 (Brennan, J., dissenting).

101. *Id.* at 867 (Brennan, J., dissenting). Justice Brennan is concerned in part that non-Article III judges are less likely to be impartial and free of political influences.

102. 501 U.S. 923 (1991).

addressed the circumstances in which magistrates can handle significant, i.e. non-subsidiary, matters. The specific issue was whether a magistrate could conduct voir dire in a felony criminal case with the consent of the parties, though the Federal Magistrate's Act did not expressly grant the power. Numerous commentators, including the previously referenced Magistrate Judge's Committee's Constitutional Study, had said that magistrates could not handle felony case matters.[103] The Supreme Court, however, ruled that the magistrate's role was permissible given party consent and given the district judge's supervision.[104]

The *Peretz* Court said that a party's consent was necessary before a magistrate could perform a delegated function that was not a "subsidiary matter."[105] The Court then said that felony voir dire matters were not subsidiary,[106] but that consent could overcome that because "litigants may waive their personal right to have an Article III judge preside over a civil trial."[107] The Court once again used a pragmatic approach, explaining that "Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen."[108] Another reason for the Court's efficiency emphasis may have been the Civil Justice Reform Act, which became law in 1990 and whose purpose was to improve efficiency by allowing district court experimentation.[109]

The *Peretz* Court also said that "[e]ven assuming that a litigant may not waive structural protections provided by Article III . . . no such structural protections are implicated by the procedure followed in this case. Magistrates are appointed and subject to removal by Article III judges."[110] The Court said that:

> We do not face a procedure under which Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact . . . Rather we confront a procedure under which Congress has vested in Article III judges the discretionary power to delegate certain functions to competent and impartial assistants,

103. Study, *supra* note 29, at 306.

104. *Peretz*, 501 U.S. at 923. The Court's ruling was a kind of modification of its decision in *Gomez v. United States,* 490 U.S. 858 (1989), holding that a magistrate could not conduct voir dire in the absence of consent and de novo district court review. *Gomez*, however, was a statutory interpretation case so no constitutional reasoning there precluded the Court's holding in *Peretz.*

105. 501 U.S. at 932.

106. *Id.* at 933.

107. *Id.* at 936.

108. *Id.* at 932.

109. SHREVE & HANSEN, UNDERSTANDING CIVIL PROCEDURE 311 (2d ed. 1994); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 143-44 (1993).

110. 501 U.S. at 937.

> while ensuring that the judges retain complete supervisory control over the assistants' activities.[111]

Thus, the latest Supreme Court decision endorses the increasing role played by magistrates in the federal court system, particularly where consent is present.

(5) The Resulting Legal Framework

The first principle in the Supreme Court cases and related commentary seems to be that magistrates cannot conduct felony criminal trials, though explanations as to why not have been conclusory, as in the Magistrate's Constitutional Study referenced earlier. But this shows that Justice Brennan's essential attributes test has some life.

Second, *Peretz* says that there are certain subsidiary matters that judges can refer to magistrates without consent. These include petty offenses and non-disposative discovery disputes.

Third, *Peretz* shows that magistrates can generally hear the middle category of matters (those not essential to Article III, nor merely subsidiary) in consent cases. Consent, though, is a necessary but not sufficient condition. The pragmatic balancing factors listed in the *Schor* case must also be analyzed in these middle cases to determine whether the congressional justification for granting power to the magistrate outweighs the intrusion on Article III values.[112] But, as *Schor* demonstrated, this balancing customarily favors upholding the non-Article III judge powers where consent is present.

Fourth, it appears that magistrates generally cannot hear the middle category of issues absent consent. The Court's views on this question are the most difficult to assess, however, because so few cases like this have arisen. But the Supreme Court seems to emphasize that consent in the magistrate context is crucial.

B. Federal Appellate Court Cases

Virtually every federal appellate court to have addressed the magistrate consent trial provisions has found them to be constitutional.[113] Among the most important are the Ninth Circuit's decision, written by then Judge Anthony Kennedy, in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix*[114] and the Seventh

111. *Id.* at 938-39.

112. One commentator specifically advocates such a practical balancing approach. Note, *The Federal Magistrates Act: A New Article III Analysis for a New Breed of Judicial Officer*, 33 WM. & MARY L. REV. 253, 290 (1991).

113. Proctor v. North Carolina, 830 F.2d 514, 518 (4th Cir. 1987).

114. 725 F.2d 537 (9th Cir. 1984).

Circuit decision in *Geras v. LaFayette Display Fixtures, Inc.*,[115] which includes a powerful Judge Posner dissent. *Pacemaker* upheld the consent trial provision's constitutionality in a case where a magistrate found that the plaintiff had a valid patent that was not infringed. *Geras* involved negligence, warranty, and tort claims. These opinions provide a foundation for looking at the constitutionality of magistrate contempt powers and usually mention the issue. Another Ninth Circuit case, *Bingman v. Ward*,[116] specifically addressed whether magistrates have any inherent contempt powers.

(1) The Magistrate Consent Trial Provision

The main reason why courts have upheld magistrate trials is because the parties consented and because nothing as significant as a felony criminal trial was occurring. The Seventh Circuit in *Geras* had a particularly instructive discussion of the consent question. Consent meant that the parties could have had trials in front of Article III judges in reasonable circumstances, but freely chose not to do so. The Seventh Circuit rejected arguments that some degree of coercion was inevitable when cases end up being tried by magistrates.[117]

Regarding the separation of power concerns, the Seventh and Ninth Circuits emphasized that the federal district courts still retained their core powers. Justice Kennedy wrote that "[t]he standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system."[118] He added that the separation of powers issue under the magistrate statute was a bit unique because "[t]he potential for disruption is instead the erosion of the central powers of the judiciary by permitting it to delegate its *own* authority."[119]

Justice Kennedy concluded, however, that no unacceptable intrusion into the judicial branch took place because the Article III judges retained virtually complete supervisory control over the magistrate system. In addition, he said that "Article III authority is preserved in other respects. District courts retain the power to

115. 742 F.2d 1037 (7th Cir. 1984).

116. 100 F.3d 653 (9th Cir. 1996).

117. *Geras*, 742 F.2d at 1042. The Seventh Circuit said that such assumptions about coercion by the Article III judge were "almost entirely speculative; there is no hard evidence of economic, or other systemic, coercion." *Id.* But the court added that, "[a]s we have said, a radical shift to trial by magistrate could easily result in a finding of unconstitutionality on the new facts." *Id.* at 1045.

118. *Pacemaker*, 725 F.2d at 544.

119. *Id.* (emphasis added).

adjudge a party in contempt."[120] In other words, the contempt authority is a crucial part of Article III power.

The Seventh Circuit likewise dismissed concerns over the fact that magistrates were required to make findings and were allowed to enter the actual judgments in these cases. The court said that "[u]nlike the relatively mechanical entry of judgment [by magistrates], the power to punish for contempt of court is the means by which many court judgments, not including the collection of money judgments, are enforced."[121] The Department of Justice letters from Mr. Fois to Congress questioning the FCIA, referenced earlier, relied on this *Geras* language to suggest that magistrate contempt power violates Article III.

Justice Kennedy further explained that the magistrate system is consistent with the "Appointments and Removal Clause" in Article II, section 2 because that section allows courts of law to appoint inferior officers such as magistrates.[122] He also described compelling policy reasons for the creation of an infrastructure:

> for determining certain civil cases with the consent of the parties and subject to judicial control. Article III courts have the task of adjudicating an ever-mounting volume of cases .... Further, the entire character of litigation that federal courts principally face is changing .... The legislature and the judiciary act responsibly when they provide and explore new, flexible methods of adjudication, especially where the evolution of the innovative mechanism is left in large part under the control of the judiciary itself.[123]

This is the kind of pragmatic focus on congressional interests, weighed against the intrusion on the judiciary, that Justice White advocated in *Northern Pipeline*.

A powerful dissent in the Ninth Circuit case by Judge Schroeder drew on the *Federalist Papers* and raised several concerns.[124] First, the dissent argued that magistrates are impermissibly "beholden to the Article III judiciary for their appointment, retention, and authority to decide cases. They are beholden to Congress for their pay."[125] Second, use of magistrates could cause Congress to create fewer Article III judgeships than would otherwise be needed.[126] Third, the

120. *Id.* at 545.

121. *Geras*, 742 F.2d at 1044.

122. *Pacemaker*, 725 F.2d at 545. Article II, section 2 of the Constitution allows Congress to vest the appointment of inferior federal officers in the President, courts of law, or department heads. If magistrates are inferior officers, then it's acceptable that the Article III district judges (courts of law) select them.

123. *Id.* at 547.

124. *Id.* at 547-49 (Schroeder, J., dissenting).

125. *Id.* at 549 (Schroeder, J., dissenting).

126. *Id.* (Schroeder, J., dissenting).

dissent said that the Appointments and Removal Clause was not satisfied since magistrates hearing Article III cases are not acting as inferior officers.[127] Fourth, consent could not cure the structural defects "arising from the wholesale delegation of judicial power to non-Article III judges."[128]

The dissent elaborated that magistrates may feel conflicted between doing what is right, and doing what they think will please the district court judges who could terminate their appointment, assign them fewer cases, or vacate their current case assignments.[129] There is also the danger of overzealous programs for judicial efficiency which have occurred in some districts.[130] For example, one federal judge in Chicago had a "rocket docket" in which cases were to be tried approximately two months after filing, no matter how complex, unless the attorneys consented to let a magistrate preside.[131]

This last objection highlights the dissent's skepticism over whether consent to magistrate trials is truly voluntary.[132] The U.S. Court of Appeals for the Third Circuit has even recognized that the the "pressure on parties to submit cases increases in direct proportion to the number of magistrate positions."[133] Judge Schroeder's dissent points out that this is coercion, not consent.

Judge Posner wrote a stinging dissent in *Geras*[134] also taking the view that magistrate trials were an improper delegation of Article III power. Judge Posner said that magistrates are assistants to Article III judges and have no more right to try cases than do a judge's law clerks or secretaries.[135] He took the Brennan approach that there are certain lines that can't be crossed in terms of delegating Article III power. This is certainly an interesting formalist position for a judge known to advocate a pragmatic jurisprudence in most other areas.[136]

127. *Id.* at 549-50 (Schroeder, J., dissenting). Article III federal district judges are viewed as principal officers who must be appointed by the President and confirmed by the Senate under Article II. To the extent that magistrates therefore assume more Article III judge-type powers, then the fact that they are not appointed by the President becomes problematic in the dissent's view.

128. *Id.* at 550 (Schroeder, J., dissenting).

129. *Id.* at 552 (Schroeder, J., dissenting).

130. *Id.* at 553.

131. I practiced in this judge's court from 1988 to 1993 and learned of his docket approach firsthand.

132. *Pacemaker*, 725 F.2d at 553-54 (Schroeder, J., dissenting).

133. *Id* at 554 (referencing the Third Circuit's decision in Wharton-Thomas v. United States, 721 F.2d 922 (1983)).

134. 742 F.2d at 1045-54 (Posner, J., dissenting).

135. *Geras*, 742 F.2d at 1046 (Posner, J., dissenting).

136. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 454-469 (1990). Judge Posner had been a law clerk for Justice Brennan on the Supreme Court.

Neither consent nor appellate review can save the statute from these structural flaws in Posner's view.

He also rejected the majority's views about the supposed importance of the magistrate statute reserving the contempt power to Article III judges. Posner recited statistics to show that the contempt power "is about as crucial as the robe. The contempt power is rarely employed in civil trials . . . The trial judge has other sanctions that usually are just as effective."[137] And he explained that courts have granted litigants such strong procedural protections against being held in contempt that "there is little practical difference between a presiding judge and a presiding magistrate so far as the contempt power is concerned."[138] He then made other arguments for why efficiency can be no excuse for violating Article III. These anti-efficiency arguments are certainly interesting coming from the inventor of the law and economics discipline. Despite the power of these two dissents, the Seventh and Ninth Circuits found that consent, combined with the district court's retaining of key powers, removed any constitutional roadblocks.

(2) A Magistrate's Inherent Contempt Power?

The Ninth Circuit specifically addressed magistrate contempt powers in the relevantly recent case of *Bingman v. Ward*.[139] Magistrate Judge Erickson was allowed, by consent, to hear and decide a case in which he ordered prison officials to provide a prisoner with dental care. Erickson fined the prison after it failed to comply. The fine amounted to a criminal contempt. The Ninth Circuit ruled that the magistrate could not issue the criminal contempt determination, and that he could only make recommendations under the former version of 28 U.S.C. section 636(e). What was the basis for the Ninth Circuit limiting the magistrate's power?

The court said there was no real consent. "[T]he prison officials never did file a consent to the conduct of criminal contempt proceedings by a magistrate judge. They only consented to the magistrate judge's jurisdiction under § 636(c) and, as we have said that does not overcome the removal of [contempt] jurisdiction in Sec. 636(e)."[140] *Bingman* also questioned whether magistrates could ever

137. *Geras*, 742 F.2d at 1049 (Posner, J., dissenting).

138. *Id.* (Posner, J., dissenting).

139. 100 F.3d 653 (9th Cir. 1996).

140. *Id.* at 658. *Cf.* Taberer v. Armstrong World Indus., Inc., 954 F.2d at 907-08 (3d Cir. 1992) (even if a contempt proceeding is treated as a misdemeanor trial, there was no specific written consent and that creates problems).

have the contempt power, even with party consent.[141] The Ninth Circuit said that "[t]he power to hold persons in criminal contempt is not only awesome, but is also an inherent power of Article III judges."[142]

III. Constitutional Analysis

A review of all the case-law in this area demonstrates that magistrate contempt powers present three closely related, complex, constitutional questions: 1) Is there a separation of powers violation under Article III?; 2) Is there a due process violation?; and 3) Is there a violation of the delegation doctrine? The close relationship is shown by the Supreme Court's statement that separation of powers mainly protect personal interests. Yet one normally associates personal interests with due process analysis, not with issues regarding allocations of government powers. Thus, due process and separation of powers principles seem to overlap here. And almost none of the Supreme Court decisions have discussed the delegation question.

Despite the above confusing triad, the Supreme Court and appellate court cases have concentrated on the separation of powers issue, and that issue is broad enough to encompass both structural and personal concerns. Thus, I believe the key to resolving the constitutionality of the FCIA contempt provisions is in conducting a separation of powers analysis. The initial step must be a descriptive assessment of how the Supreme Court would likely rule on the constitutionality of the FCIA contempt provisions.[143] A normative assessment of the Court's likely approach follows.[144]

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141. The court said:

> [M]ore fundamentally "it is well-established that litigants cannot confer [subject matter] jurisdiction by consent where none exists." (citations omitted) . . . To be blunt about it, Congress has explicitly provided that these criminal contempt proceedings must be conducted by district judges upon certifications from magistrate judges. Congress has not given magistrate judges that jurisdiction and no one–not [even] the parties . . . can confer that jurisdiction upon them . . . . Contempt proceedings implicate the authority, the discretion, and the dignity of Article III courts.

Bingman, 100 F.3d at 658.

142. *Id.* at 657.

143. It is worth noting that my descriptive view of the Court's position is supportive of broad magistrate authority where consent is present. Thus, even if I have given an overly broad interpretation of magistrate power, that nonetheless enhances the legitimacy of my argument that summary criminal contempt powers for magistrates are unconstitutional. In other words, I am still arguing that magistrates cannot be given summary criminal contempt powers without consent even if one assumes virtually the broadest possible authority for magistrates.

144. Several law review articles have tried to develop their own proposed tests for determining whether Article III power is impermissibly being negated by delegations of authority to Article I courts or magistrates. *See e.g.* Hinde, *supra* note 70, at 1168-75;

A. The Descriptive Assessment and Application

(1) The Summary Criminal Contempt Provision

There are many reasons to think the Court would find the summary criminal contempt power unconstitutional. Most importantly, no consent is required, and the magistrate would be using a power that the Ninth Circuit and other courts have described as "inherent" to Article III, suggesting that contempt power is an essential element of a district judge's arsenal. The absence of consent creates a strong presumption against the magistrate's legitimacy here. This view is further supported by the scholar who pointed out that "an adjunct [court] that is not an Article I court but has the power to enforce its own orders (other than through administrative sanctions) has not yet been held constitutional."[145] Certainly in 1967, the Judicial Conference and the Senate had "serious doubts" about giving magistrates contempt authority.

Second, in summary criminal contempt proceedings, separation of powers and the defendant's individual rights are violated because the magistrate is both judge and prosecutor, no formal hearing is required, and there is no defense counsel, yet jail time is a possible penalty.[146] Moreover, no standard of appellate review is specified in the FCIA. Supreme Court Justice Frankfurter even said that summary criminal contempt proceedings fall outside due process parameters,[147] but are a necessary evil for Article III judges. No such necessity exists for giving non-Article III judge such dramatic powers when the parties have not consented to such authority.

Third, the most persuasive precedents are on this side. Several courts have written scholarly opinions which reason convincingly that it is unconstitutional for Congress to grant contempt power to bankruptcy judges. Their reasoning can be applied to magistrates.[148]

Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 29. Yet the Bartell article is not even about magistrates, and the Hinde article does not focus on the magistrate contempt issue or on what powers magistrates have when there's no consent. Thus, these articles are not that helpful here. Another article says that bankruptcy judges should only be able to recommend contempt like the former version of the Magistrate's Act. Richard Murphy, Note, *Can They Do That? The Due Process and Article III Problems of Proposed Findings of Criminal Contempt in Bankruptcy Court*, 78 MINN. L. REV. 1607 (1994). Certainly this Minnesota article supports my argument that part of the FCIA contempt provision goes too far.

145. Bartell, *supra* note 144, at 45.

146. *See generally* Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345 (2000).

147. Sacher v. United States, 343 U.S. 1, 72 (1952).

148. An extremely scholarly ruling to this effect is Cox Cotton Co. v. Cryts, 24 B.R. 930 (E.D. Ark. 1982). That case even quotes an important and relevant 1924 law review article to support its reasoning. *Id.* at 950 (*citing* Frankfurter & Landis, *Power of Congress*

Judicial and legislative proponents of the summary contempt provision, however, respond by saying that magistrates are hampered because they can't act forcefully against lawyers who show them disrespect in the courtroom. Moreover, the FCIA penalties are small. The longest jail sentence it permits magistrates to impose is 30 days. Thus, the pragmatic balance of interests heavily favors the summary criminal contempt provision.

Yet the Supreme Court and other authorities have reported that the magistrate judge system has worked remarkably well, even though magistrates have been devoid of this supposedly essential authority.[149] Indeed, the legislative history did not include any data or studies to show this is a widespread problem that has serious effects. In addition, it would seem to be in the interest of most attorneys not to irritate magistrates who have significant discretion over many aspects of their cases including scheduling and the setting of bonds, not to mention the magistrates' ability to impose sanctions. And interestingly, virtually all the congressional testimony for this provision came from magistrates judges or federal judges who have strong institutional interests and biases in favor of expanding the magistrate role.[150] Thus, the balance of interests here weighs against constitutionality.

The Administrative Office of U.S. Courts has argued that limited magistrate criminal contempt power is constitutional because it is akin to the petty criminal offenses that magistrate judges can try without consent. Is this analogy right? It would seem not because the Supreme Court has said that the contempt authority is a "potent weapon" that can be "deadly" if misapplied.[151] Moreover, the Ninth Circuit has referred to the contempt power as "awesome."[152] Why is it so awesome? As mentioned earlier, separation of powers is basically negated in summary contempt cases, whereas even a petty crime defendant at least has his own counsel and faces a prosecutor other than the judge.[153] The Ninth Circuit specifically stated in *Bingman v.*

Over Procedure in Criminal Contempts in "Inferior" Federal Courts – A Study in Separation of Powers, 37 HARV. L. REV. 1010 (1924)). The Ninth Circuit has expressed skepticism about bankruptcy contempt power also, though its decision involved statutory interpretation and not constitutional reasoning. *In re* Sequoia Auto Brokers Ltd., Inc., 827 F.2d 1281 (9th Cir. 1987).

149. *Peretz v. United States*, 501 U.S. 923, 928 n.5 (1991) (quoting Gov't of the Virgin Islands v. Williams, 892 F.2d 305, 308 (3d Cir. 1989)) ("It can hardly be denied that the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who conceived it.")

150. The absence of any academic testimony in the record is startling.

151. Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n, 389 U.S. 64, 76 (1967).

152. *In re* Sequoia Auto Brokers Ltd., Inc., 827 F.2d at 1285.

153. Moreover, the defendant in a petty criminal case may later have a malicious prosecution claim available. But the defendant in a consent case cannot sue the

Ward[154] that, "criminal contempt proceedings are not the same as simple misdemeanor prosecutions." The Ninth Circuit and other courts therefore reject the petty offense analogy. Moreover, the Office of Legal Counsel of the United States, in a related context, has said that reduced penalties don't make a constitutionally suspect delegation of power to magistrates acceptable.[155]

One final point worth mentioning is the need for at least some limit on magistrate power to be established. It is clear that magistrates would like to wield more power, and many federal judges think that would ease their dockets too. Yet at some point there could be no remaining difference between magistrates and district judges, despite their obviously different Article III status. The summary contempt area is the logical place to draw a line rather than open the floodgates and undermine Article III entirely. Several courts have suggested this is where the line should be drawn.

(2) The Other Criminal and Civil Contempt Provisions

In contrast, the Supreme Court would probably find the other contempt parts of the FCIA constitutional because they are largely premised on consent. Indeed these contempt provisions are modeled after the trial consent provisions which have been upheld by lower courts. Moreover, greater procedural protections must generally be afforded the defendant, in non-summary contempts. An example is Rule 42(b) of the Federal Rules of Criminal Procedure compared to Rule 42(a).[156] The structural burdens are not so serious that consent cannot make up for them.

First, Congress has reasons for providing this limited power to magistrate judges given the growing federal court caseloads and the need for magistrates to control those lawyers who have consented to be in their court. Second, the penalties that can be imposed are small and the procedural protections with this kind of contempt high (e.g. the judge is not the prosecutor, the defendant can retain an attorney, etc.). And third, as Judge Posner pointed out in his *Geras* dissent,

magistrate judge later for malicious conduct because of judicial immunity.

154. 100 F.3d at 658 (9th Cir. 1996).

155. Memorandum from Office of Legal Counsel Director Walter Dellinger, to the Department of Justice (Dec. 6, 1993) (on how the limited nature of criminal forfeiture penalties does not mean it's constitutional for magistrates to hear such matters), *available at* http://www.usdoj.gov/olc/forfeit.htm.

156. Rule 42(b) specifies that non-summary contempts require notice to the defendant stating "the time and place of hearing, allowing a reasonable time for the preparation of the defense, and [stating] the essential facts constituting the criminal contempt charged and describe it as such." FED. R. CRIM. P. 42(b). The court there may appoint an attorney in the contempt proceeding and the defendant may be entitled to a jury trial. By contrast, summary contempts under Rule 42(a) are handled immediately in front of the judge who witnessed them with none of those guarantees. FED. R. CRIM. P. 42(a).

statistics show that the contempt power has not been used that much by district courts over the years. Thus, it seems unlikely that there will be a "phalanx" of contempt proceedings that will overwhelm magistrates.

B. The Normative Perspective

From a normative perspective though, and more fundamentally, I think the Court is wrong in the separation of powers test it employs. First, consent should not be so important. Second, the balancing of factors should not be so one-sided whenever consent is present. The Court errs when it says that the personal interests of the litigants, and not structural interests, are the major concerns of the separation of powers doctrine.[157] Separation of powers questions should not turn largely on the consensual waiver of individual rights.

Indeed, by definition, separation of powers doctrine here should be about whether Article III power is being denuded. After all, concerns such as a lack of subject matter jurisdiction cannot usually be cured by party consent, because fundamental institutional interests are at stake.[158] And the dissenters in *Pacemaker* argued against magistrate consent authority to conduct trials, reasoning that it effectively nullifies Article III.[159] Even the Wright and Miller *Federal Practice and Procedure* treatise expresses concern about eroding Article III by giving magistrates too many powers.[160] And a related structural concern, discussed before, is that Congress will not create more federal judgeships if Congress can solve the problem of overloaded dockets by giving magistrates more powers. The Article III judiciary's response in upholding broad magistrate powers might in the long run actually help Congress aggrandize power.

Moreover, a closer examination of the judicial reasoning in *Schor* and *Geras* shows their consent focus can lead to rather extreme results. The Court in *Schor* said that Article III would be violated if "Congress created a *phalanx* of non-Article III tribunals equipped to

157. Several other commentators agree with my view that the major separation of powers concern here is structural, and that the effect on individual rights is purely secondary. *See, e.g.*, Thomas G. Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 306 (1981) (noting that "the due process guarantee of fairness to litigants does not protect the full range of values sheltered by Article III" and referring to the "structural values" Article III protects); Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1952-53 (1984).

158. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851-53 (1986).

159. *See e.g.*, Geras v. LaFayette Display Fixtures, Inc., 742 F.2d 1037, 1046 (7th Cir. 1984) (Posner, J., dissenting) (stating that magistrates are essentially assistants to Article III judges and have no more right to try civil or criminal cases that do the judge's secretary).

160. WRIGHT ET. AL., *supra* note 33, at 399.

handle the entire business of the Article III courts without Article III supervision."[161] This language would seem to suggest that magistrates can try felony criminal proceedings with consent so long as "the decision to invoke this [non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected."[162] Consent in this case could entirely negate the distinction between district judges and magistrate judges.

How should the balancing be carried out then if consent is not viewed as the key? Constitutionality should depend on a sliding scale. The closer the matter is to an essential attribute of Article III power, the stronger the need to have Article III judges perform the function. For example, criminal sentencing is a crucial Article III judicial function, but monitoring the attorney's selection of a jury is not. Consent remains relevant, but only on a limited basis. *Bingman* also seems to support my position in the contempt area. But unfortunately, the Supreme Court's *Schor* decision suggests that consent may be key.

If my approach were adopted, then the FCIA summary criminal contempt provision would still be found invalid. But the other contempt provisions might also be thrown out because they involve core Article III powers being given to non-Article III judges with little justification. This approach would also provide a principled basis for why felony trials could never be handled by magistrates even with party consent. It would therefore mean that if Congress wanted to have strong independent judges who can control their dockets, Congress would have to create more of them by filling the existing federal court vacancies, rather than simply relying on magistrates. In the long run, this would best reinforce separation of powers.

Conclusion

For the reasons mentioned, the FCIA's summary contempt provision is probably unconstitutional, but the Supreme Court would likely uphold the other contempt provisions. So what should magistrate judges do if they have a terribly obstructive lawyer in their courtroom and cannot rely on summary criminal contempt? They should follow Judge Posner's *Geras* dissent where he suggests they rely on punitive measures such as sanctions. The Ninth Circuit in *Grimes v. San Francisco*[163] said that magistrates have the sanctioning power even though it expressed skepticism about magistrate criminal contempt power in *Bingman*. Besides sanctions, magistrates are undoubtedly experts at keeping lawyers on tight leashes and setting

161. 478 U.S. at 855 (emphasis added).
162. *Id.*
163. 951 F.2d 236, 240-41 (9th Cir. 1991).

effective case schedules. Moreover, magistrates can still certify contempt matters for a district judge's examination and ultimate decision.

Is there any way magistrates can utilize the contempt powers to minimize the constitutional problems? Magistrate consent forms could expressly indicate the parties are consenting to the magistrate's use of the contempt power in appropriate circumstances. In addition, magistrates should use the power cautiously, such as by employing the minimum penalty needed. For example, magistrates may wish to use only a financial penalty and stay away from jailing a lawyer. A reviewing court could completely reverse a financial penalty, but a lawyer who has been improperly jailed can never be made fully whole.

These suggestions should minimize antipathy towards magistrates' expanding authority. But, for the reasons mentioned earlier, such precautions do not cure the constitutional flaws in the new magistrate summary criminal contempt provision. Indeed, it would be good for the Supreme Court to take this issue head-on and strike down the provision because it would send a message that magistrate power can only go so far. After all, this issue involves nothing less than the federal judiciary's independence.